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IN THE
COURT OF APPEALS OF INDIANA

INLAND STEEL COMPANY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-0703-EX-203
	)	
ARMONDO MARTINEZ,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WORKER'S COMPENSATION BOARD OF INDIANA
Application No. C-147249

July 27, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Armondo Martinez ("Martinez") suffered two injuries in the course of his employment with Inland Steel Company ("Inland Steel") rendering him permanently and totally disabled. The Worker's Compensation Board ("the Board") ordered Inland Steel to pay permanent total disability benefits to Martinez. Inland Steel appeals and argues that pursuant to Indiana Code section 22-3-3-13(b), the Second Injury Fund is responsible for payment of Martinez's permanent total disability benefits. Concluding that Martinez does not qualify for Second Injury Fund benefits, we affirm.

Facts and Procedural History

In 1988, Martinez suffered an injury to his left arm during the course of his employment with Inland Steel, which resulted in amputation of that arm above the elbow. After recuperating from his injury, Martinez returned to work at Inland Steel.

In 1996, Martinez suffered a work-related injury to his right arm while he was swinging himself up onto a forklift. Martinez underwent several medical procedures due to this injury. On June 26, 1997, Martinez's physician determined that he "is not disabled from pursuing some type of work duty that may require light use of his right upper extremity," that he "may be able to lift up [to] 5-10 lbs. with his right hand," but that "repetitive activity may be more troublesome to him in the next [] several years." Appellant's App. p. 17.

Martinez continued to work for Inland Steel, but due to continued complaints of pain and numbness in the fourth and fifth digits of his right hand, he ceased working in the fall of 1997. Martinez also expressed feelings of devastation resulting from his

injuries and "worrie[d] about the lasting physical ability of his remaining right hand and arm due to its overuse." Id. at 18.

On February 4, 1998, Dr. Carl Moultrie, an independent medical examiner, concluded that Martinez "had reached maximum medical improvement and was capable of a sedentary desk type job with no lifting over ten (10) pounds, no pulling or climbing." Id. Dr. Timothy Raykovich imposed lifting restrictions and concluded that Martinez "cannot climb, balance, kneel, or crawl and may occasionally stoop and/or crouch. [His] ability to reach, handle, feel and push/pull is limited on the right due to decreased motor function and is completely absent on the left." Id. A rehabilitation consultant concluded that Martinez's work restrictions "place him in a very narrow range of sedentary employment, which . . . are unavailable to [him] due to his stated functional capacities and his inability to consistently sustain participation in a very narrow range of available sedentary work." Id. at 19.

Martinez filed an Application for Adjustment of Claim on August 26, 1998. He also filed an application for Second Injury Fund benefits on November 12, 2003. Inland Steel filed a motion to add the Second Injury Fund as a necessary party to the action, but its motion was denied. A hearing was held on October 28, 2004.

On April 28, 2006, the Single Hearing Member issued an award concluding that Martinez was permanently and totally disabled and that Inland Steel was responsible for payment of permanent total disability benefits. Inland Steel filed an application for review by the Board, and on January 26, 2007, the Board issued an order affirming the Single Hearing Member's award. Inland Steel now appeals.

Discussion and Decision

Inland Steel argues that the Second Injury Fund is responsible for payment of Martinez's permanent total disability benefits. Indiana Code section 22-3-3-13(b) provides:

> If an employee who from any cause, had lost, or lost the use of, one (1) hand, one (1) arm, one (1) foot, one (1) leg, or one (1) eye, and in a subsequent industrial accident **becomes permanently and totally disabled by reason of the loss, or loss of use of, another such member or eye**, the employer shall be liable only for the compensation payable for such second injury. However, in addition to such compensation and after the completion of the payment therefor, the employee shall be paid the remainder of the compensation that would be due for such total permanent disability out of a special fund known as the second injury fund, and created in the manner described in subsection (c).

Ind. Code § 22-3-3-13(b) (2005 & Supp. 2007) (emphasis added).

Inland Steel asserts that because Martinez is permanently and totally disabled due to the amputation of his left arm and the injury to his right arm, he qualifies for Second Injury Fund Benefits under section 22-3-3-13(b). Our resolution of this issue involves a question of law, which we review de novo. DePuy, Inc. v. Farmer, 847 N.E.2d 160, 164 (Ind. 2006).

Our court has held that the phrase "loss, or loss of use of" "clearly and unambiguously refers to those workers who no longer possess a certain body part, or to those who no longer possess the use of a certain body part." See Linville v. Hoosier Trim Prods., 664 N.E.2d 1178, 1179-80 (Ind. Ct. App. 1996), trans. denied ("[T]he word 'lost' connotes total deprivation of a body part, or the total deprivation of the use of a body part. The word 'lost' simply does not suggest the mere diminution of the use of a body part.").

In Linville, the claimant sustained work-related injuries to each of her hands in two separate incidents. Id. at 1180 n.2. Because the two injuries combined rendered Linville permanently and totally impaired, she requested benefits from the Second Injury Fund. Id. at 1180. Our court affirmed the Board's denial of her request for those benefits for the reason that "Linville did not lose either of her hands, nor did she lose the use of either of her hands."[1] Id.

Martinez is permanently totally disabled as a result of the amputation of his left arm and subsequent injury to his right arm. However, as the Board found, Martinez "has not lost the use of his right upper extremity, but suffered an agreed partial impairment." Appellant's App. p. 21. Because Martinez has not been totally deprived of the use of his right arm, the injury to his right arm did not result in the "loss, or loss of use of" that arm. See Linville, 664 N.E.2d at 1179-80. We therefore conclude that the Board did not err when it determined that Second Injury Fund benefits are not available to Martinez.[2]

Affirmed.

DARDEN, J., concurs.

KIRSCH, J., dissents with separate opinion.

[1] Judge Riley dissented and stated, "[i]n keeping with the goal of liberal construction [of the Worker's Compensation Act], the phrase "lost the use of" should be interpreted to refer to either total or partial loss." Id.

[2] Inland Steel asserts that if it is held responsible for Martinez's permanent total disability benefit payments, "it will discourage employers from hiring persons with an obvious, substantial disability." Br. of Appellant at 12. However, Indiana Code section 22-3-3-12 allows apportionment of worker's compensation awards in the event that an injury suffered in the course of employment aggravates a previous permanent injury or physical condition.

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KIRSCH, Judge, *dissenting.*

For the reasons set out in Judge Riley's dissent in Linville v. Hoosier Trim Prods., 664 N.E.2d 1178, 1180 (Riley, J., dissenting), I respectfully dissent. I would reverse and remand to the Board with instructions that Martinez receive compensation from the Second Injury Fund.